ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	PR Docket No. 94-105
Petition of the People of the	)	
State of California and the	)	
Public Utilities Commission	)	
of the State of California to	)	
Retain Regulatory Authority	)	
Over Intrastate Cellular Service	)	
Rates	)	
	)	

OPPOSITION BY LOS ANGELES CELLULAR TELEPHONE COMPANY ("L.A. CELLULAR") TO PETITION FOR RECONSIDERATION OF CELLULAR RESELLERS ASSOCIATION, INC. ("CRA")

I.

INTRODUCTION

Pursuant to Section 1.106(g) of this Commission's Rules, L.A. Cellular opposes the CRA Petition For Reconsideration ("CRA Petition") of the Commission's May 19, 1995 Report and Order regarding the Petition by the State of California to retain regulatory authority over intrastate cellular service rates. The Petition by the State will hereinafter be referred to as the "California Petition"; the May 19, 1995 Report and Order will be referred to as the "California Report and Order"[1].

[1] CRA is the only party to seek reconsideration of the California Report and Order, with the State itself having decided on June 8, 1995 not to seek review.

The CRA Petition is extraordinarily bereft of legal argument and factual analysis. There is a total failure to address critical findings to the effect that cellular rates are falling in California, that cellular profits have for the most part been reinvested in additional plant and equipment, and that California's arguments about capacity utilization and high rates of return are unfounded. California Report and Order paragraphs 97, 122, 129, 130, 131, 136-138. Taken by themselves, these findings are more than sufficient to support the ultimate conclusion that California has failed to carry its burden of showing that "market conditions...fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory"[2].

Ignoring these larger points, CRA does little more than pick at nits. Its Petition attempts to make three points, i.e. that:

- California should not be criticized for failing to give proper weight to the impact of PCS, SMR and other new technologies, since these technologies are unlikely to be in place prior to March, 1996. CRA Petition, paragraphs 3-5.
- It is wrong for this Commission to expect evidence of customer dissatisfaction, or carrier misconduct in a State where existing regulation has allegedly prevented them. CRA Petition, paragraphs 6-8.

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[2] See 47 USC Section 332(c)(3)(B).

- Notwithstanding OBRA[3], this Commission should allow California to dispose of complaints regarding unreasonably discriminatory cellular service rates. CRA Petition, paragraphs 9-12.

CRA's argument with regard to PCS Services is simply wrong. Impending as well as existing competition are both relevant to this Commission's analysis under Section 332(c)(3)(B). See Section II below. As for the standard of proof regarding customer satisfaction and anti-competitive conduct, CRA's quarrel is with Congress, and not this Commission. It is Congress which defined the State's burden of proof, and which assigned that burden to all jurisdictions including those which, like California, have maintained relatively strict control over cellular marketing practices. See Section III below.

Finally, there is the question of an appropriate forum for complaints regarding discriminatory rates. Paragraph 147 of the California Report and Order correctly states that the broader question of FCC authority over intrastate CMRS rates has been raised and will be addressed in connection with the CMRS Second Report and Order. See Note 6 below. In the interim the resellers are adequately protected by this Commission's long-standing policy forbidding discrimination against cellular resellers. See Section IV below.

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[3] Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, Title VI, §6002; See 47 U.S.C. §332 for relevant parts.

II.

THIS COMMISSION WAS ENTITLED TO GIVE WEIGHT TO UNREBUTTED EVIDENCE REGARDING THE IMPENDING ENTRY OF NEW COMPETITORS

The heart of the California Report and Order is Paragraph 97, which states:

> The principal bases for our decision are straight-forward. First, unrebutted evidence shows that cellular rates in California are declining. Second, the CPUC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide-area SMR. Third, the CPUC presents no evidence of systematically collusive or other anti-competitive practices concerning the provision of any CMRS. Fourthly, the CPUC does not present evidence showing wide spread customer dissatisfaction by CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fifth, the CPUC fails to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers). An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. No such demonstration exists on this record.

As noted above, CRA simply ignores the Commission's findings with regard to the first and fifth grounds for the California Report and Order. Its argument with regard to the second ground is limited to a statement that since PCS and SMR services will not be available to substantial portions of the population until after March 1, 1996, they should not play a role in determining whether market forces are a sufficient protection against carrier misconduct.

The exact date when PCS will be marketable is irrelevant to these proceedings. As implicitly acknowledged by CRA's own filings herein, as well as those of Nextel and others, the advent of new technologies has already influenced the conduct of California cellular carriers. California Report and Order, paragraph 32-33. In essence, they have accelerated construction activities, and reduced rates for volume users and other customers willing to commit themselves

to service for at least one year. While CRA and Nextel allege that these rate reductions are in some way anti-competitive, the main point for the present is that emphasized by paragraphs 32-33, and accompanying notes, of the California Report and Order. Impending entry by potential rivals is an essential part of competitive analysis. This Commission's rule of thumb, supported by the case law, is that a threat of entry within two years from the present is likely to have a significant impact on existing competitors. The threat of competition motivates existing service providers to lower prices and to adopt new technologies. See, for example, the evidence adduced by the California Report and Order at note 88.

The difficulty with California's argument, and that of CRA, is that it is almost exclusively focused on past competitive conditions which have been influenced primarily by the duopoly nature of the cellular market. This structure was mandated by the Commission, and has been heavily influenced by the tight controls imposed until very recently by California's regulators over rate changes.

But these are matters of the past. The advent of PCS and SMR means that the cellular market is already beginning to adapt to multiple facilities-based rivals. The CPUC for its part began in 1993 significantly to relax its own hold on the market, while OBRA will have the effect of freeing market mechanisms even more.

CRA and California were on notice of all of this. L.A. Cellular's own filings had demonstrated the direct correlation between regulatory reform in California, and increased cellular competition, thus confirming this Commission's repeated findings regarding the anti-competitive effect of tariffing regimes of the sort which have been imposed by California. The

same is true of PCS/SMR which were expressly designed as a counter-weight to perceived cellular market dominance. Knowing this, California and CRA should have addressed themselves to the potentially pro-competitive impacts of abolishing tariff requirements and mandating open entry for new technologies. California and CRA failed to do this, and the Commission was entirely correct in noting this failure.

III.

THE ABSENCE OF PERSUASIVE EVIDENCE OF CUSTOMER DISSATISFACTION AND/OR CARRIER MISCONDUCT WAS PROPERLY CONSIDERED BY THIS COMMISSION

CRA argues that a State proposing to retain regulatory authority cannot reasonably be expected to provide evidence of anti-competitive behavior or consumer dissatisfaction.

In essence, CRA takes issue with the congressionally defined standard of review for a petition under OBRA. OBRA requires a showing that "market conditions...fail to protect subscribers adequately" from unjust, unreasonable, or discriminatory rates. 47 U.S.C. 332(c)(3)(B). Relying on the statutory standard, this Commission properly determined that petitions under Section 332(c)(3)(B) "must be based on demonstrable evidence of anti-competitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates." California Report and Order Paragraph 29. Congress made no exception for states with existing regulatory schemes; indeed, its standard of review applies only to such states[4].

[4] Under OBRA, only states which regulated CMRS rates as of June 1, 1993 could file a petition for authority to continue such regulation after August 10, 1995.

Both California and CRA understood their burden under OBRA, and each attempted to bring forward "evidence" of anti-competitive conduct. See, e.g. California Petition, pages 25-34; CRA Reply To Oppositions [etc.], pages 12-17. But, neither entity brought forward evidence of customer dissatisfaction, even though the CPUC maintains both a separately funded Division of Ratepayer Advocates, as well as a Consumer Affairs Division, both of which are chartered to entertain customer complaints.

California and CRA, aware of their burden, failed to carry it. The reason for their failure is not that California's regulatory regime somehow stifled the allegedly anti-competitive instincts of the carriers. Regulation is no guaranty against anti-competitive behavior, or unreasonable prices. Indeed, both California and CRA alleged that basic service rates <u>are</u> unreasonable. However the <u>evidence</u> failed to support the allegation, with this Commission noting that "average nominal prices fell between 0.5 and 15.5 percent overall during the five year period for which data are available." California Report and Order at paragraph 122. Users have migrated to non-basic rate plans, and that those in the best position to know - the consumers themselves - have not shown widespread dissatisfaction with rates or service quality. California Report and Order, paragraphs 97 and 114. Under these circumstances, the problem is not with the standard of review imposed by Congress - it is with the poverty of California's showing[5].

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[5] As suggested by paragraph 98 of the California Report and Order, there is real irony in the evolution of CRA's argument. Having earlier contended that California rates and profit levels were unreasonably high, and having alleged anti-competitive conduct by the carrier, CRA now asks this Commission to conclude that existing regulation has kept rates low, and dissuaded carriers from acting anti-competitively. CRA's strategy shows more rhetoric than

IV.

UNDER THE STATUS QUO, RESELLER COMPLAINTS REGARDING UNREASONABLY DISCRIMINATORY CELLULAR RATES MAY BE ADDRESSED TO THIS COMMISSION

CRA's concluding point is that the California Report and Order has not made it clear where disputes over the fairness of reseller rates may be adjudicated. CRA appeals for the Commission to restore this function to the State of California. CRA's implication is that without doing this, there would be a sort of regulatory limbo during which the resellers would be without a remedy in the event cellular carriers unreasonably discriminate against them.

There is in fact no "critical void in regulatory authority".

As noted by the California Report and Order at Paragraph 147, the extent to which the FCC has power to resolve complaints about intrastate service rates under Sections 201 and 202 of the Communications Act is now before the Commission in the context of the CMRS Second Report and Order. See In the Matter of Implementation of Sections 3(m) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order released March 7, 1994, paragraphs 173 et seq. Issues regarding CMRS to CMRS interconnection are similarly ripe for disposition. Second Notice of Proposed Rulemaking, released April 20, 1995, In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54.

Pending resolution of these wider questions, the Commission currently has jurisdiction to entertain reseller complaints about discriminatory rates. This Commission's continuing

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logic.

policy, which has remained unchanged from well before enactment of the Budget Act to the present, has been to prohibit any form of unreasonable discrimination against resellers. Commission declarations on this subject have made no distinction between interstate and intrastate services, and should provide the resellers with the assurances they seek. See, for example, Petitions for Rule-Making Concerning Proposed Changes to the Commission's Resale Policies, 6 FCC RCD 1719, 1725-26[6] (1991); In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service; CC DKT 91-34, Report and Order (June 10, 1992), Note 48;

Interestingly, CRA does not ask this Commission to act against alleged instances of unreasonable discrimination. Rather, it seeks to re-endow the states with such authority. To accede to this request would fatally undermine the principles of the Budget Act which have been so recently reaffirmed in the California Report and Order. If the states were in a position to adjudicate the reasonableness of cellular rates, or to correct perceived instances of unfair discrimination, they would, in effect, be in a position to re-balkanize the cellular industry. This cannot have been in the intent of Congress, and should not be the result of these proceedings.

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[6] "Cellular carriers must permit resellers to take service on the same terms and conditions as any other cellular customer would take service." Id. at 1725.

CONCLUSION

CRA has not made a prima facie case for reconsideration of the California Report and Order. This Commission should act accordingly, and should do so on or before the statutory deadline. Other issues relating to the Commission's jurisdiction over intrastate CMRS rates should be decided in the context of the CMRS Second Report and Order. In the meantime, this Commission should continue its current policy regarding reseller allegations of unreasonable discrimination.

Respectfully submitted,

Los Angeles Cellular Telephone Company

By _____
David M. Wilson, Esq.
Young, Vogl, Harlick & Wilson

Dated: July 5, 1995

CERTIFICATE OF SERVICE

I, Katherine T. Wallace, do hereby certify that true copies of the foregoing "Opposition by Los Angeles Cellular Telephone Company ("L.A. Cellular") to Petition for Reconsideration of Cellular Resellers Association, Inc. ("CRA")" were sent this 5th day of July 1995, by first-class United States mail, postage prepaid, to the following:

Peter Arth, Jr., Esquire
Edward W. O'Neill, Esquire
Ellen S. LeVine, Esquire
State of California Public Utilities Commission
505 Van Ness Avenue
San Francisco CA 91402

Joel H. Levy
William B. Wilhelm, Jr.
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington DC 20036

John Cimko, Chief
Mobile Services Division
Federal Communications Commission
Room 644; Mail Stop 1600D
1919 M Street, N.W.
Washington DC 20054

David A. Gross, Esquire
Kathleen Q. Abernathy, Esquire
AirTouch Communications
1818 N Street, N.W., 8th Floor
Washington DC 20036

Mary B. Cranston, Esquire
Megan Waters Pierson, Esquire
Joseph A. Hearst, Esquire
Pillsbury Madison & Sutro
P.O. Box 7880
San Francisco CA 94120-7880

Alan R. Shark, President
American Mobile Telecommunications Association, Inc.
115 18th Street, N.W., Suite 250
Washington DC 20036

Elizabeth R. Sachs, Esquire
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington DC 20036

David A. Simpson, Esquire
Young, Vogl, Harlick & Wilson
425 California Street, Suite 2500
San Francisco CA 94101

Adam A. Anderson, Esquire
Suzanne Toller, Esquire
Bay Area Cellular Telephone Company
651 Gateway Boulevard, Suite 1500
San Francisco CA 94080

Richard Hansen, Chairman
Cellular Agents Trade Association
11268 Washington Blvd., Suite 201
Culver City CA 90230

Michael B. Day, Esquire
Jeanne M. Bennett, Esquire
Michael J. Thompson, Esquire
Jerome F. Candelaria, Esquire
Wright & Talisman, P.C.
100 Bush Street, Shell Building, Suite 225
San Francisco CA 94104

Michael F. Altschul, Esquire
Randall S. Coleman, Esquire
Andrea D. Williams, Esquire
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W., Suite 200
Washington DC 20036

Mark Gascoigne
Dennis Shelley
Information Technology Service
Internal Services Department
County of Los Angeles
9150 East Imperial Highway
Downey CA 90242

Russell H. Fox, Esquire
Susan H.R. Jones, Esquire
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington DC 20005

David M. Wilson, Esquire
Young, Vogl, Harlick & Wilson
425 California Street, Suite 2500
San Francisco CA 94104

Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland WA 98033

Howard J. Symons, Esquire
James A. Kirkland, Esquire
Cherie R. Kiser, Esquire
Kecia Boney, Esquire
Tara M. Corvo, Esquire
Mintz, Levin, Cohn, Ferris Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington DC 20004

James M. Tobin, Esquire
Mary E. Wand, Esquire
Morrison & Foerster
345 California Street
San Francisco CA 94104-2576

Thomas Gutierrez, Esquire
J. Justin McClure, Esquire
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W., Suite 1200
Washington DC 20036

Jeffrey S. Bork, Esquire
Laurie Bennett, Esquire
U.S. West Cellular of California, Inc.
1801 California Street, Suite 5100
Denver CO 80202

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Albertson
1255 23rd Stret, N.W.
Washington DC 20037

Mark J. Golden, Acting President
Personal Communications Industry Association
1019 19th Street, N.W., Suite 1100
Washington DC 20036

Michael Shames, Esquire
1717 Kettner Blvd., Suite 105
San Diego CA 92101

Peter A. Casciato
A Professional Corporation
8 California Street, Suite 701
San Francisco CA 94111

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Ave., N.W.
Washington DC 2005

Judith St. Ledger-Roty, Esquire
James J. Freeman, Esquire
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington DC 20036

William J. Sills, Esquire
Christine M. Crowe, Esquire
McFadden, Evans & Sill
1627 Eye Street, N.W., Suite 810
Washington DC 20006

Richard McKenna
GTE Services Corporation
600 Hidden Ridge
HQ EO3J36
Irving TX 75015-6362


Katherine T. Wallace